NO. 88-595

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

OFFSHORE EXPRESS, INC.,
Petitioner

VERSUS

BARBARA JOHNSON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

86-3302

BARBARA JOHNSON,
Plaintiff-Appellee,
Cross-Appellant,

versus

OFFSHORE EXPRESS, INC.,
Defendant-Appellant,
Cross-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-83-5263-L

(June 3, 1988)

Before RUBIN, KING and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge:

Offshore Express appeals a judgment by the district court in favor of Barbara Johnson, a seaman injured while employed by Offshore. The district court found Offshore negligent under the Jones Act and

the M/V CHAMPION EXPRESS, upon which Johnson was working, unseaworthy. The court awarded Johnson damages for lost earnings, pain and suffering, and disfigurement and total permanent physical disability. Johnson, on cross-appeal, asserts that the damages awarded were inadequate. Offshore also appeals the district court's denial of its motion for a new trial based on newly discovered evidence and fraud. We affirm.

I. Factual Background and Prior Proceedings

In November 1982, appellee/cross-appellant Barbara Johnson sought employment with appellant/cross-appellee Offshore Express, Inc. as an able bodied seaman and cook. Johnson, although only approximately five feet in height, had previously accumulated over 150 days of sea time with various offshore vessel companies and had

obtained an able bodied seaman's license from the United States Coast Guard. Offshore hired Johnson, and on or about April 22, 1983, assigned her to a 165 foot supply boat, the M/V CHAMPION EXPRESS, to carry out sanitation and maintenance duties inside the enclosed cabin area of the vessel. Because of Johnson's height and inexperience, it was agreed that she would perform no duties outside the enclosed cabin area.

On April 22, 1983, while the M/V CHAMPION EXPRESS was still in dock, the mate, James Clay, ordered Johnson to make up the bunks in the passenger quarters of the vessel. Johnson did not comply with the order. On April 27, 1983, while the vessel was moored to an offshore drilling platform, Clay once again ordered Johnson to make up the bunks. At the time, the M/V

CHAMPION EXPRESS was moored "side to" the platform and the seas were at four to six feet. Winds were ten to fifteen knots. This time Johnson complied with the mate's order and began to make up the bunks. Johnson asserts that while she was making up an upper bunk, a shift by the vessel caused her to fall from the bunk some six feet to the deck and land on her lower back. She asserts she had been making up the bunk from a kneeling position on the mattress with her legs dangling over the edge. She claims that she had been making up the bunk in this manner because she was unable to reach the width of the upper bunk by standing on the deck, or on the folding step used to facilitate entry into the bunk, or on the sideboard of the lower bunk. The accident was unwitnessed, although the cook for the vessel, in the

nearby galley, heard a disturbance. Upon entering the passenger quarters, the cook saw Johnson on the floor in obvious pain.

The following day the vessel docked on shore, and Johnson was taken by ambulance to the Abbeville General Hospital in Abbeville, Louisiana. She was discharged the following day. Hospital records reported a large bruise on Johnson's lower back. Johnson returned to her residence in Galveston, Texas, and was examined by Dr. John Moore just over ten days later. She complained of severe headaches, back pain, and urinary problems. A bruise was still visible on Johnson's lower back. Johnson moved to New Orleans and began medical treatment with Drs. Alain F. Cracco, an orthopedic surgeon, and R.C. Llewellyn, a neurosurgeon. During an examination by Dr. Cracco on June 3, Johnson complained of

pain, urinary problems, inability to sit up, and numbness and weakness in her left leg. Johnson exhibited a list of the lumbar spine to the left. Dr. Cracco referred her to Dr. Satish Karnik, a urologist, for a urological evaluation of her urinary problems.[1] Drs. Cracco and Llewellyn then performed back surgery on Johnson primarily to relieve compression of nerve roots, believed to have been brought on by trauma from the fall.

Johnson remained in the hospital

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[1]Dr. Karnik diagnosed Johnson as suffering from severe urinary stress incontinence and a neurogenic bladder. Urinary stress incontinence is a mechanical problem of the bladder that can be caused by numerous conditions, including having children or a hysterectomy. A neurogenic bladder involves a neurological dysfunction of the bladder. Dr. Karnik had no definite opinion as to what caused either problem, but he recommended surgery to relieve the urinary stress incontinence.

recovering from this surgery until September 1983, when, after achieving significant recovery, she was transferred to another hospital to undergo intensive physical and occupational therapy. Johnson's condition, however, began to deteriorate--she began to exhibit a 10 degree hip flexion, internal rotation of her left hip, leg, and foot, and curvature of the spine. She also complained of experiencing great pain and being unable to walk.

On December 5, 1983, Dr. Richard Levy, a neurosurgeon, examined Johnson. During this examination, Johnson walked with a severe tilt to the left with her left hip, leg, and foot inwardly rotated. She claimed this posture helped to relieve the pain she was experiencing. She exhibited severe paraspinal muscle spasms and

numbness in the lower part of both legs and said she was still experiencing urinary problems. Dr. Levy diagnosed Johnson as suffering from arachnoiditis,[2] probably arising from complications from the previous back operation. One week later, Dr. Cracco re-examined Johnson and decided to perform exploratory surgery and remove an arachnoid cyst which apparently had developed from complications from Johnson's initial back surgery. After recovering from this second operation, Johnson resumed her therapy. She remained in the hospital until the end of May, except for a short period during April at another hospital

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[2]Arachnoiditis is the inflammation of the filmy covering of the nerve roots of the lumbar region which leads to the formation of scar tissue. This scarring in turn results in the malfunction of the affected nerves and severe pain. This is a permanent condition and cannot be cured.

where she had a gall bladder operation.

Johnson was discharged from the hospital in June 1984, and transferred to the Touro Pain Center. Here, she was examined by Dr. Gary Glynn, who could find no major neurological dysfunction. Johnson continued to exhibit a tilted hip and an inwardly rotated left hip, leg, and foot which she claimed helped to relieve the pain she was experiencing. Dr. Richard Morse, a psychiatrist and neurologist at Touro, reviewed reports from various examining physicians and concluded that Johnson may have been exhibiting complications and symptoms that were not really present and may have been experiencing various psychiatric disorders. He felt that some of Johnson's pain may have been brought on by emotional factors. Dr. Morse characterized Johnson as not

being very open to counseling and not exhibiting any motivation to improve her condition. Dr. Morse, however, did not disbelieve that Johnson was experiencing great pain.

Due to Dr. Morse's conclusion that Johnson was not responding to treatment at the Touro Pain Center, Johnson was discharged to home care after about a month. She then rented an apartment in New Orleans. Her teenaged son Michael helped care for her. She made periodic visits to doctors and physical therapists during this time. She remained on pain medication but was able to walk with crutches by the end of the year. Dr. Neil Baum, a urologist, examined Johnson on August 31, 1985, and confirmed Dr. Karnik's diagnosis of urinary stress incontinence, but he did not conclude that Johnson was also suffering

from a neurogenic bladder. During a second visit to Dr. Levy on November 26, 1985, now two and a half years after her injury, Johnson continued to complain about severe pain in her lower back, left hip and leg, numbness in the left leg, and urinary problems. She held her left leg and foot inwardly rotated.

In the meantime, Johnson had filed suit against Offshore on October 25, 1983, in the United States District Court for the Eastern District of Louisiana. As a seaman employed by Offshore at the time of her injury, she advanced claims of negligence under the Jones Act, 46 U.S.C. § 688, and unseaworthiness under general maritime law. On October 16, 1984, Offshore filed a third-party medical malpractice action against two of Johnson's treating physicians, Drs. Cracco and Llewellyn, for

indemnity for the maintenance and cure payments Offshore made to Johnson and for damages incurred by Offshore as a result of alleged negligence and unwarranted medical treatment by the two doctors.

Both actions were tried without a jury beginning January 6, 1986. After an eleven day trial, the district court rendered judgment in favor of Johnson on her claims of Jones Act negligence and unseaworthiness against Offshore and the M/V CHAMPION EXPRESS. The court found Offshore 80% at fault for Johnson's injuries and Johnson 20% at fault. The court ruled in favor of Drs. Cracco and Llewellyn on Offshore's third-party action against them, holding that malpractice was not proved. The court awarded Johnson damages of $37,180 for past lost wages; $123,708 for future lost wages; $370,000 for past and future mental pain

and suffering; and $185,000 for past, present and future disfigurement and physical disability.[3]

Johnson filed a number of post-trial motions, urging the court to reconsider several of its findings. She urged that the court had erred in its failure to award her any damages for her urinary problems. In addition, she claimed the court's calculation of damages attributable to lost wages was too low because it was based on the incorrect assumption that she only worked nine months a year. Johnson also pointed out that Offshore was entitled to a $10,056 credit in the judgment against it for maintenance and support paid by Offshore prior to the trial. The district

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[3]These damages were gross and subject to a 20% reduction attributable to Johnson's contributory negligence.

court issued an amended judgment on April 8, 1986, to incorporate the $10,056 credit for Offshore, but did not grant Johnson any further relief. Offshore then appealed the court's finding of negligence against it, the finding of unseaworthiness against the M/V CHAMPION EXPRESS, and the award of damages. Johnson cross-appealed the judgment on the issues of damages for her urinary problems and the calculation for lost wages.

The scene shifts. On July 28, 1986, approximately six months after the trial, fourteen individuals were arrested by U.S. Customs Service agents in connection with an investigation into a conspiracy to overthrow the government of the Republic of Suriname. This group of arrestees included Barbara Johnson and her son Michael. Johnson was subsequently indicted for

conspiracy under 18 U.S.C. § 371 and for violations of the Neutrality Act, 18 U.S.C. §§ 960, 962. On November 5, 1986, she was sentenced to one year in federal prison.

On February 23, 1987, Offshore filed a motion for a new trial under Fed.R.Civ.P. 60(b). Offshore asserted two grounds for a new trial: the "newly discovered evidence" of Johnson's post-trial activities (Fed.R. Civ.P. 60(b)(2)), and alleged fraud, misrepresentation, and misconduct by Johnson during the previous trial (Fed.R. Civ.P. 60(b)(3)). Offshore supported its motion with the affidavits of two U.S. Customs agents who had worked undercover in connection with investigating the conspiracy. These agents allegedly had seen Johnson exhibit a much improved physical condition and had heard her downplay the seriousness of her

disabilities. These same agents also stated that Johnson's physical condition appeared greatly deteriorated after she was arrested and was told that there might be cameras covering the arrest.

The motion for new trial was argued before the district court on April 8, 1987. The court denied the motion. Offshore appeals this ruling and this appeal has been consolidated for our review with the direct appeal of the rulings of the district court regarding the negligence of Offshore, the unseaworthiness of the M/V CHAMPION EXPRESS, and the damages awarded Johnson.

II. The Findings of Jones Act Negligence

Questions of negligence and causation in admiralty cases are treated as fact questions. Landry v. Oceanic Contractors, Inc., 731 F.2d 299, 302 (5th Cir. 1984);

Cheek v. Williams-McWilliams Co., Inc., 697 F.2d 649, 652 (5th Cir. 1983). Findings of fact in admiralty cases are binding unless clearly erroneous. Landry v. Oceanic Contractors, 731 F.2d at 302. Evidence of the "slightest" negligence is sufficient to sustain a finding of Jones Act liability. Theriot v. J. Ray McDermott & Co., Inc., 742 F.2d 877, 881 (5th Cir. 1984); Allen v. Seacoast Products, Inc., 623 F.2d 355, 361 (5th Cir. 1980). We have described the burden on a plaintiff for showing causation in a Jones Act claim as "featherweight". Smith v. Trans-World Drilling Co., 772 F.2d 157, 162 (5th Cir. 1985); Davis v. Hill Engineering, Inc., 549 F.2d 314, 331 (5th Cir. 1977).

The district court found that Offshore was negligent in ordering Barbara Johnson, a five foot tall person, to make up upper

bunks in four to six foot seas without providing her with assistance and knowing of her inexperience. The court found that a lurch by the vessel caused Johnson to fall backwards onto the deck while she was making up an upper bunk. We accept this finding of negligence under the clearly erroneous standard. There is sufficient evidence in the record to support the finding.

The record establishes that although Johnson had an able bodied seaman's license, she had spent relatively little time at sea. The majority of the time she had spent at sea evidently was as a cook. The record does not show that Johnson had experience in making up upper bunks in a vessel. Offshore was aware of Johnson's relative inexperience and obviously of her short stature.

The bunk from which Johnson fell was 4'5" above the deck. There was no dispute that the bunk in question was a proper design and standard configuration for its intended use--sleeping. The bunk was equipped with a small folding step 15 inches above the deck and with a hand railing situated on the ceiling over the middle of the bunk. This equipment, however, was designed to help people get into the upper bunk for sleeping and at best only indirectly to facilitate making up the bunk. Each bunk also had a sideboard 3-1/2" higher than the top of the mattress, except for a space approximately 2-1/2' located at the middle of the bunk to allow entry into the bunk. This sideboard was designed to protect a person from falling out of the bunk while sleeping.

Johnson's safety expert, Alvin Marks,

testified that because of Johnson's stature, it was physically impossible for her to reach across the width of the upper berth mattress to make up the bunk from a standing position on the folding step or from a standing position on the lower bunk sideboard. There were diagrams and photographs supporting this testimony. Offshore's witnesses did not seriously contend that Johnson could have or even should have made up the upper bunk by standing on the folding step or the sideboard of the lower bunk. They instead asserted that safer alternative methods of making up the upper bunk were available.[4]

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[4]One of Offshore's witnesses testified that it would have been safer for Johnson to climb totally into the upper bunk, face the length of mattress rather than the width, and use her foot and knee as a brace against the sideboard of the bunk.

There was no evidence, however, that Johnson was told about these alternative methods or even knew about them. The mate who gave Johnson the order testified that he had not even thought about how Johnson would make up the bunks or considered her size before assigning the task. There was also testimony from much taller witnesses that making up an upper bun was a difficult task, especially in rolling seas. Finally, there was expert testimony to the effect that the mate should have given Johnson an assistant to help her make up the upper bunks.

The testimony as to whether Johnson was offered assistance in making up the bunks was somewhat contradictory. It was uncontradicted, however, that the mate ordered Johnson to make up the bunks without providing her with assistance. The

engineer for the vessel, Dennis Olson, testified that while she was making up the bunks but prior to her fall, Johnson told him she was having a dizzy spell. Olson testified that he offered to assist Johnson in making up the remaining bunks or to get another crewman to assist but that Johnson refused this assistance. In her testimony before the court, Johnson denied that she had been experiencing dizzy spells prior to her fall and that she had this conversation with Olson. She also denied being offered any assistance in making up the bunks. The district court had the responsibility to sift through this contradictory testimony, assessing the witnesses' credibility, in making its findings of fact as to the events in question.

Finally, Offshore alleges that the evidence did not support the finding that

there had been a lurch by the M/V CHAMPION EXPRESS on April 27, 1983, causing Johnson to topple from the upper bunk. The record is to the contrary. There is no dispute that the seas were four to six feet the day of the accident. There was testimony that in such seas, and given the mooring and rigging of the vessel, the M/V CHAMPION EXPRESS could have shifted in such a way to cause Johnson to fall from her perch on the upper bunk. Such a shift might not have been noticeable to others on the vessel at the time because they were not in a position where their balance was thrown off as was Johnson. The fact that Johnson was the only one on board who noticed the lurch is not necessarily unusual and does not negate the district court's finding that there had been a lurch. See Curry v. Fluor Drilling Services, Inc., 715 F.2d 893, 895

(5th Cir. 1983).

III. The Finding of Unseaworthiness

To be seaworthy, a vessel and its appurtenances must be reasonably suited for the purpose or use for which they were intended. Mitchell v. Traveler Racer, Inc., 362 U.S. 539, 550, 80 S.Ct. 926, 933 (1960). The owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. 362 U.S. at 549, 80 S.Ct. at 932. See also Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 100 (5th Cir. 1985). Liability under the doctrine of unseaworthiness does not rest upon fault or negligence. Hussein v. Isthmian Lines, Inc., 405 F.2d 946, 947 (5th Cir. 1968).

There is a more demanding standard of

causation in an unseaworthiness claim than in a Jones Act negligence claim. Smith v. Trans-World, 772 F.2d at 162; Landry v. Oceanic Contractors, 731 F.2d at 302. To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonable probable consequence of the unseaworthiness. Smith v. Trans-World, 772 F.2d at 162; Alverez v. J. Ray McDermott & Co., Inc., 674 F.2d 1037, 1042-43 (5th Cir. 1982). Some condition or defect may be a legally sufficient cause of an injury under a Jones Act theory of liability but not under an unseaworthiness theory. Smith v. Trans-World, 772 F.2d at 162; Landry v. Oceanic Contractors, 731 F.2d at 302. We

stress again that Jones Act negligence and unseaworthiness under general maritime law are two distinct causes of action, each involving separate standards of proof, causation, and review. Comeaux v. T.L. James & Co., Inc., 702 F.2d 1023, 1024 (5th Cir. 1983).

Despite the higher standard for establishing causation on an unseaworthiness claim, we hold that the district court was not clearly erroneous in finding that the M/V CHAMPION EXPRESS was unseaworthy and this unseaworthiness was a proximate cause of Johnson's injury. Specifically, the court found that the vessel was unseaworthy because, first, it lacked proper equipment for a person only five feet tall to make up an upper bunk in four to six foot seas, and, second, the vessel lacked adequate manpower.

The testimony established that no adequate equipment was provided to Johnson to make up the upper bunks. The small fold-down step and the overhead handrail clearly were not designed for making up the upper bunk, and the mate testified that he would not use this equipment to make up upper bunks because it was unsafe. In any event, testimony and exhibits sufficiently established that these devices were inadequate to enable Johnson to make up the upper bunk because of her height. The court concluded that had Johnson been provided with a ladder, and an assistant to hold the ladder, she could have performed her bunk making duties with reasonable safety. As it was, the court found that the only way Johnson could have performed her duties was to crawl up into the upper bunk, kneel on the edge of the mattress and

thus expose herself to any shift by the vessel. Under general maritime law, unseaworthiness can be manifested by an unsafe method of work, such as the failure by a shipowner to provide adequate equipment for the performance of an assigned task. Vargas v. McNamara, 608 F.2d 15, 18 (1st Cir. 1979); Webb v. Dresser Industries, 536 F.2d 603, 606 (5th Cir. 1976), cert. denied, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 1157 (1977).

There was testimony by the various experts, including Johnson's, that ladders and platforms for use for making up upper bunks are not standard shipboard equipment or appliances, and that the design and configuration of the bunks in the passenger cabin of the M/V CHAMPION EXPRESS were in accordance with usual maritime practice. This testimony did not establish the

seaworthiness of the M/V CHAMPION EXPRESS. Customary or normal industry practice alone does not establish seaworthiness. June T., Inc. v. King, 290 F.2d 404, 406 (5th Cir. 1961); Davis v. Associated Pipe Line Contractors, Inc., 305 F.Supp. 1345, 1349 (W.D. La. 1968), aff'd 418 F.2d 920 (5th Cir. 1969), cert. denied, 397 U.S. 988, 90 S.Ct. 1119, 25 L.Ed.2d 396 (1970). In the case of someone the height of Johnson, some type of ladder or platform was necessary in order for the person to make up the upper bunks in safety given the seas running and the mooring. No such equipment was provided Johnson when she was ordered to perform this task.

The fact that there may have been a safer alternative method for Johnson to make up the upper bunk, by climbing all the way into the bunk and facing lengthwise to

the mattress, does not break the causal claim in this unseaworthiness claim. While testimony did establish that this alternative method was probably safer, there was no testimony establishing that Johnson was aware of this method, or should have been aware, or that this method was really feasible. See Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1194 (5th Cir. 1982). For these reasons, we hold that the district court's finding of unseaworthiness was not clearly erroneous.

IV. Finding that Johnson Was 20% Contributory Negligent

A trial court's allocation of percentages of fault is a finding of fact and is not to be disturbed unless clearly erroneous. Allied Chemical Corporation v. Hess Tankship Company of Delaware, 661 F.2d 1044, 1057 (5th Cir. 1981). The court in

the case at bar found that Barbara Johnson was 20% at fault for her accident and that her negligence was a legal cause of her injuries. The court found Johnson at fault for not insisting that the mate provide her with assistance and proceeding with making up the upper bunk in a risky manner, knowing from her experience as a seaman that the vessel, in four to six foot seas, could lurch and cause her to be thrown from the bunk.

Under the Jones Act and the law of seaworthiness, contributory negligence, however gross, does not bar recovery, but only mitigates damages. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431, 59 S.Ct. 262, 266, 83 L.Ed. 265 (1939); Scott v. Fluor Ocean Services, Inc., 501 F.2d 983, 984 (5th Cir. 1974). Although the seaman has a duty to use reasonable care, the

seaman's duty to protect himself is slight since this duty is tempered by the realities of maritime employment. Ceja v. Mike Hooks, 690 F.2d at 1193. Generally, a seaman has no duty to find the safest way to perform his work. Rather, the duty to provide for a safe course of conduct lies primarily with the vessel owner. 690 F.2d at 1194.

We find the allocation of fault by the district court adequately supported by the record and thus not clearly erroneous. Offshore contends that Johnson's alleged refusal of assistance from Olson constituted a superseding act of negligence sufficient to establish Johnson's negligence as the sole proximate cause of her injury. This extreme claim must fail. The 80%-20% allocation of fault is supported by the record. Furthermore,

Johnson denied that Olson had offered to assist her in making up the upper bunks, and the district court had the discretion to evaluate the credibility of the various witnesses.

V. Damages

A trial judge's assessment of damages is also a finding of fact which we review under the clearly erroneous standard. Hernandez v. M/V RAJAAN, 841 F.2d 582, 587 (5th Cir. 1988); Sosa v. M/V LAGO IZABAL, 736 F.2d 1028, 1035 (5th Cir. 1984). This Court will not overturn a damage award unless the trier of fact abused its discretion. Hernandez, 841 F.2d at 587; Bartholomew v. CNG Producing Co., 832 F.2d 326, 331 (5th Cir. 1987). We overturn damage awards only in exceptional cases where such awards are so gross as to be contrary to "right reason". Bartholomew,

832 F.2d at 326. Furthermore, we do not determine excessiveness of damage awards by comparing verdicts in similar cases, but rather we review each case on its own facts. Hernandez, 841 F.2d at 587; Winbourne v. Eastern Airlines, Inc., 758 F.2d 1016, 1018 (5th Cir. 1984), cert. denied, 474 U.S. 1036, 106 S.Ct. 603, 88 L.Ed.2d 582 (1985).

A. The Finding of Total Permanent Disability and the Award for Lost Earnings

The district court found that because of her back and leg physical impairments Barbara Johnson was totally disabled from all forms of gainful employment due to her inability to sit or stand for any significant length of time. The court found that Johnson would be totally

disabled for the remainder of her life.[5] The court found that Johnson's back and leg problems stemmed largely from arachnoiditis, which was a complication resulting from her initial back operation. Dr. Levy, one of Offshore's medical experts, testified at trial that the arachnoiditis, and the accompanying severe pain, was a permanent condition, rendering Johnson permanently disabled from pursuing any kind of activity that would require prolonged standing or sitting.

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[5]Bobby Roberts, Johnson's expert in the field of vocational rehabilitation, evaluated Johnson on October 14, 1985, and testified at trial that there was no job Johnson was presently capable of performing given her problems with sitting and standing. Roberts testified that even if Johnson acquired some kind of college degree, if her physical condition stayed the same, the most she could look forward to was part-time work with an agency that used handicapped workers.

The court found that Johnson could not walk more than a few steps without the aid of her crutches. The testimony of Teresa Ross, a physical therapist who had worked with Johnson, supported this findings. The court also found that Johnson suffered from congenital spina bifida which Dr. Cracco testified had been aggravated by the trauma from Johnson's fall, causing it to become symptomatic. The court also found that Johnson suffered from a vertical displacement between he left and right hip. The testimony of Dr. Gary Glynn and Teresa Ross supported this finding. The court also found that Johnson walked with a noticeable limp. The court, however, concluded that Johnson had failed to prove that the abnormal inward rotation of her left hip, leg, and foot had resulted from

the accident.[6] We find the district court's determination that Johnson was totally and permanently disabled and unable to obtain future employment adequately supported by the record and not clearly erroneous.

Offshore does not challenge the actual amount of damages for lost earnings, or the method used to calculate that amount. But in her cross-appeal, Johnson contends that the court erred in reducing her award for past and future lost earnings by 25% on the assumption that Johnson worked only nine months out of the year. Johnson, however,

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[6]The court found that this condition may have been a voluntary posture to relieve pain and was not constant. The testimony at trial did not establish any objective medical reason for this rotation. The court did not include this condition in its consideration of the extent of Johnson's disability.

testified that in the past she had worked only nine months out of the year and had taken the summers off in order to vacation with her children. We do not find the court's assumption that Johnson worked only nine months out of the year, and the calculation of past and future lost earnings based on this assumption clearly erroneous.

B. Pain and Suffering/Disfigurement and Physical Disability

The district court awarded Johnson $370,000 past and future pain and suffering and $185,000 for disfigurement and physical disability. Offshore asserts that these amounts are inordinate and grossly excessive when compared with awards in similar cases, and clearly erroneous because of insufficient corroborating medical testimony. We do not agree.

We address the award for disfigurement and physical disability first. The court awarded these damages because of Johnson's having to walk on crutches for the remainder of her life. The finding is adequately supported by the testimony establishing that Johnson suffers from arachnoiditis, spina bifida, and a displaced hip. We find that the award for disfigurement and physical disability, although generous, is sufficiently supported by the record and not excessive.

In regard to the damages for pain and suffering, we have recently stated: "'[A]ny amount awarded for pain and suffering depends to a great extent on the trial court's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation.'" Hernandez, 841 F.2d at 590

(quoting Hyde v. Chevron, U.S.A., Inc., 697 F.2d 614, 632 (5th Cir. 1983)). We have also held that each award for pain and suffering depends heavily on its own facts. Allen v. Seacoast Products, 623 F.2d 355, 364 (5th Cir. 1980). The district court's award for Johnson's severe, constant and permanent pain is adequately supported by the medical testimony at trial. None of the doctors who testified asserted that Johnson had not experienced serious pain and that she wold not suffer similar pain the remainder of her life. The diagnosis of arachnoiditis by Dr. Levy amply substantiates Barbara Johnson's subjective testimony regarding the pain she was suffering. We do not consider this award for pain and suffering clearly erroneous or excessive.

C. The Urinary Problems

In her cross-appeal, Johnson asserts that the district court erred in not awarding her any damages for her urinary problems by finding that these problems were not caused or aggravated by her accident. We find no error.

Dr. Cracco and Dr. Baum both testified that Johnson's urinary stress incontinence was not related to her nerve root problem or related in any way to her fall. There was testimony that Johnson had suffered from this condition well before the accident and had even had a bladder suspension operation to correct the problem in 1977. Dr. Baum testified that the reappearance of Johnson's urinary stress incontinence was attributable to the failure of this previous operation and was in no way related to her fall. Dr. Karnik opined that Johnson's urinary stress

incontinence may have been aggravated by her fall.

Dr. Karnik also diagnosed Barbara Johnson as suffering from a neurogenic bladder that was probably caused by her nerve root problems and arachnoiditis. Dr. Baum, however, did not believe Johnson was suffering from a neurogenic bladder because of his inconsistent findings as to the sensitivity of Johnson's bladder nerves. We cannot attribute error to the court's crediting Dr. Baum's testimony over Dr. Karnik's. Charpentier v. Fluor Ocean Services, Inc., 613 F.2d 81, 85 (5th Cir. 1980). We conclude that the district court's negative findings as to Johnson's urinary problems are not clearly erroneous.

VI. The Motion for New Trial

We now turn our attention to the most serious and difficult aspect of this case,

the motion for a new trial. It is well established law that a motion for new trial under Fed.R.Civ.P. 60(b) is addressed to the sound discretion of the trial court whose decision will not be reversed absent a clear abuse of discretion. Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 144 (5th Cir. 1975), reversed on other grounds, 425 U.S. 273, 96 S.Ct. 5532, 47 L.Ed.2d 784 (1976); Birchem v. Burlington Northern Railroad Company, 812 F.2d 1047, 1050 (9th Cir. 1987); Rosebud Sioux Tribe v. A&P Steel, Inc., 733 F.2d 509, 515 (8th Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984); Square Construction Company v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981).

Offshore asserted two grounds under Rule 60(b) upon which to grant a new trial. The

first ground was "newly discovered evidence" under Rule 60(b)(2). This "newly discovered evidence" offered by Offshore were details of Johnson's involvement in the conspiracy to overthrow the Republic of Suriname some six months **after** the original trial. "Newly discovered evidence" under Rule 60(b)(2), however, must be evidence of facts existing at the time of the original trial. N.L.R.B. v. Jacob E. Decker and Sons, 569 F.2d 357, 364 (5th Cir. 1978); Munford v. Bowen, 814 F.2d 328, 330 (7th Cir. 1986); Corex Corp. v. United States, 638 F.2d 119, 121 (9th Cir. 1981); Still v. Townsend, 311 F.2d 23, 24 (6th Cir. 1962); Ryan v. United States Lines Co., 303 F.2d 430, 434 (2nd Cir. 1962); Brown v. Pennsylvania Railroad Co., 282 F.2d 522, 526-7 (3rd Cir. 1960), cert. denied, 365 U.S. 818, 81 S.Ct. 690, 5 L.Ed.2d 696

(1961); 11 Wright & Miller ¶ 2859, at 182. The evidence presented by Offshore clearly does not meet this requirement.

The second ground which Offshore asserted for a new trial was fraud, misrepresentation, and misconduct under Rule 60(b)(3). Offshore claimed that Barbara Johnson had faked physical problems and lied about the extent of her injuries during her personal injury trial. Offshore claimed that Johnson's post-trial activities revealed that she was not nearly as disabled as she had previously presented herself at trial and that she faked serious crippling whenever she was near a courthouse or camera.

An allegation of fraud urged by a party as a basis for new trial under Rule 60(b)(3) must be established by clear and convincing evidence. The conduct

complained of must have prevented the moving party from fully and fairly presenting his case or defense. Montgomery v. Hall, 592 F.2d 278, 278-9 (5th Cir. 1979); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Square Construction Co., 657 F.2d at 71; Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126, 93 S.Ct. 940, 35 L.Ed.2d 258 (1973); Atchison, Topeka and Santa Fe Railroad Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957). This subsection of Rule 60(b) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. Rozier, 573 F.2d at 1339. Granting a motion for new trial under Rule 60(b) on the basis of fraud or other misconduct is within the discretion of the district court that presided in the previous litigation,

although because this rule is remedial in nature it should be liberally construed. Id. at 1346. In an extensive search we have been unable to discover any previous cases where a court has granted a motion for new trial under Rule 60(b) based on the fraud, misrepresentation, or misconduct of a plaintiff in testifying to his injuries in a personal injury lawsuit.[7] We decline at this point to rule out the possible use of a Rule 60(b) new trial motion in such circumstances, but merely hold that the

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[7]In Atchinson, Topeka, and Santa Fe Railroad Co. v. Barrett, supra, the district court denied a motion for new trial which asserted that a plaintiff had faked personal injuries in order to recover damages from his employer in a personal injury suit. The Ninth Circuit upheld the denial on appeal although the court stated that had the district court granted the motion, it "would not have disturbed that conclusion, on the record before us." 246 F.2d at 849.

district court did not abuse its discretion in declining to grant such a motion on the record in this case.

Offshore's allegations do not establish that the district court abused its discretion in denying Offshore's motion for new trial on the basis of fraud. During the hearing on the motion for new trial, the district court explained that it had not based the award of damages in the earlier trial on Johnson's testimony or presentation of her injuries, but instead on medical testimony. The record adequately supports the district court's statement. The district court explained that it had not believed everything that Johnson had said during the trial. This is evidenced by the decision not to award Johnson any damages for her inwardly rotated hip, leg, and foot or for her

urinary problems. During the trial the court had viewed a videotape recording showing Johnson walking without manifesting the rotated hip, leg, and foot condition and thus knew Johnson was capable of exaggerating her ailments.[8] The doctors who testified as to Johnson's disability and injuries were also aware that Johnson exaggerated her physical disabilities. The district judge stated that she had

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[8]The videotape was a selection of recordings taken during intermittent surveillance of Johnson by Offshore prior to the trial. During the trial, the court was also aware that Johnson was capable of driving a car, swimming, and walking some distance on her crutches. The court knew that Johnson had attended classes at a local community college for three semesters after her accident. The court was also aware that Johnson was showing some improvement in her ability to get around. These activities do not undermine the court's award of damages to Johnson since they do not involve prolonged sitting or standing. Nor do they show that Johnson no longer suffered from severe pain.

adequately discounted Johnson's testimony and her contrived appearances in the trial and the alleged new evidence of Johnson's ability to fake injury did not change anything.[9] We see no abuse of discretion.

We also do not believe the evidence of fraud presented to the district court by Offshore was clear and convincing. Depositions taken by Johnson's lawyer of the government agents greatly undermined the impact of their previous affidavits. In these depositions, the two agents were much less cure of the extent of Johnson's

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[9]It bears repeating that the district court based its finding of disability largely on the pain Johnson suffered from arachnoiditis and her inability to stand or sit for long periods of time because of this pain. Johnson's alleged activities in the conspiracy are not necessarily contrary to this finding. There was solid objective medical evidence supporting the diagnosis of arachnoiditis.

abilities and activities than they were in their affidavits.[10] The depositions also reveal that much of the alleged evidence of fraud consisted of what Johnson said she could do under the lure of a huge monetary reward if the freebooting conspiracy had succeeded. The affidavits did not show

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[10]In their depositions, the agents explained that the type of activities they saw Johnson engaged in prior to her arrest included conversations in the lobby and walkways of a motel while leaning on a railing or a lightweight can,e eating dinner at a restaurant near the motel, walking to and from the restaurant with her cane, and attending various meetings in rooms of the motel. Both agents, however, admitted to seeing Johnson walking with a limp. The depositions also reveal that Johnson's "transformation" into a much more crippled individual did not occur until after she had been arrested ad hauled around in a van and car for several hours while handcuffed, with no opportunity to walk around, and with no access to her pain medication. Under these circumstances it is not implausible that Johnson wold exhibit a much more serious physical condition upon her arrival in New Orleans at the United States Customs House.

what she was actually capable of doing. Overall, this evidence of fraud calls for much conjecture and is by no means clear and convincing.

Johnson herself may not have been thoroughly candid with the court as to her condition. But the court accepted this and did not rely upon her testimony. Thus, the showing of fraud would have to be based either upon fraud in the medical testimony itself or fraud in her misleading the doctors as to her condition. But the court found that the medical diagnoses were based upon objective physical evidence. The doctors themselves also recognized that appellant's own subjective presentations were likely exaggerated and distorted. Obviously, there was no fraud in the medical evidence. And on this record we must uphold the conclusion of the district

court that the medical evidence was objective and was not to any significant extent based upon Johnson's assertions of disability. We find no abuse of discretion in denying the motion for new trial on the basis of fraud.

Finally, if Johnson's physical condition actually has improved after trial, this is not grounds for a new trial. Judgments are final as to the condition that existed at trial, absent misconduct. A prediction by way of court finding as to a future disability which later proves to be incorrect because of unexpected improvement after trial cannot justify a new trial.

VII. Conclusion

Upon a thorough review of the record, we affirm the district court's finding of Jones Act negligence against Offshore Express, the court's finding of

unseaworthiness as to the M/V CHAMPION EXPRESS, and the award of damages to Barbara Johnson. None of these findings are clearly erroneous. We also conclude that the district court did not abuse its discretion in denying Offshore's motion for new trial.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-5263-L

BARBARA JEAN JOHNSON

VS.

OFFSHORE EXPRESS, INC.

ORAL RULING ON MOTION FOR NEW TRIAL BY DISTRICT COURT
April 8, 1987

Beginning at Page 33, Line 11:

Why don't you sit down and let me rule. I want to go back to what this Court found at the time this case was tried, back, was it in 1986?

MR. VERDERAME:

Yes, Your Honor, January.

THE COURT:

I want to make it very plain, because I think, Mr. Womack, in your

memorandum, you said things in there that were not so, and I hope that my Court Reporter did not put that in the transcript, and I want to make it very clear, I have got it in my notes right here that I dictated from.

I found that based upon the weight of the credible evidence, and this certainly was Dr. Levy's testimony, that at the time back in whenever of 1986, that she could not walk more than a few steps without at least one Lofstrand crutch.

And I found that she was suffering, she had two surgeries. As a result of those surgeries, she had had scaring, and because of that scaring, Dr. -- and this is all medical testimony -- because of that scaring, she was suffering from pain in her back, and Dr. Levy testified to that.

She had spina bifida. I found that

the spina bifida was aggravated by the fall that she had and I said that the evidence reflected at that time that prior to this incident, that she was in relatively good health capable of working long hours, and I found that her spina bifida was aggravated as a result of the accident.

And I said, based upon Dr. Levy's testimony, that she's suffering from arachnoiditis caused from a tear in the dura as a result of the first surgery and it's a permanent condition as testified to by the medical doctors, that this is rendering her permanently disabled causing her pain.

I found that the Plaintiff suffers from an abnormally inward rotation of the left hip, and I said it is voluntary. I said, "Although the Defendants took hours and hours of film which showed that

Plaintiff was able to walk straight, there was one short segment that there appears to be no clinical reason for her to walk that way, and the Court concludes that Plaintiff has failed to prove that this abnormal rotation of the hip and walking on the outside of her foot resulted from the accident."

I wanted the record to reflect that at no time did this Court give Barbara Johnson any amount of money for this hip, this inversion of her foot for the abnormal rotation of the hip, but I did find there was a two-inch difference between her left and her right hi that was testified to by objective findings, and she does walk with a limp. And Dr. Levy testified that this limp is permanent, that she cannot sit or stand for long periods of time.

Now, based upon the testimony of Dr.

Baum, I found that Plaintiff's urinary problems are not related to the accident in question. I did not give her a penny for any urinary problems at all.

I also made the statement that there have been insinuations by Dr. Glynn and Dr. Morse throughout the trial, really, that the Plaintiff has psychiatric problems, that she has overly exaggerated he deformity or rotation of the hip, and no reason has been found for the manner in which she walks, her gait, and although the Court felt that Barbara Johnson exaggerated her illnesses and her walk, that there was no one person, not one medical person who testified that she was a malingerer.

And she's had two back operations. I see seamen come in here working out there offshore with one back operation who are permanently disabled from ever working,

and, I mean, Barbara Johnson had two and a tear in her dura, that nobody made up. That exists. That's the testimony. Now, I found that based upon the testimony, that she could not return to doing seaman's work.

Maybe Barbara Johnson was not a hundred percent credible, and I think that's what I attempted to say in a nice way when I said that she's exaggerated, she needs psychiatric treatment, there are problems, but that does not necessarily mean that she wasn't injured.

Just because Barbara Johnson went out on this trip with these mercenaries does not indicate to this Court that she is capable of working, that this is just something that was made up. She's had the operations.

Barbara Johnson was a person that

was different, she was unusual. I think she worked in the circus, she did all of these unusual things. It does not surprise me she would be in the middle of something like this.

Whether she did actually go for three weeks or four weeks without a crutch, I don't know. I doubt it. I doubt that she could continuously go at a particular job without some type of pain, without some type of a cane, perhaps to walk. I don't believe that just because she says this is just for show that it really is just for show.

I am not going to grant your motion. If, however, you, Mr. Womack, had brought before the Court medical evidence, doctors which have examined Barbara Johnson now to tell me that she is capable of employment, that she doesn't need a cane ever, that she

could stand and work for eight hours without having to sit or lie down, as the prior testimony was, then, Mr. Womack, I would have seriously considered it.

But what do you have? You've got two agents saying that they observed her and I haven't read those depositions, but I am sure that Mr. Verderame would not misrepresent to the Court that in there there are extenuating circumstances, they didn't see her for eight hours a day.

I'm sure she's better than she was at the time that the Court rendered its ruling. Hopefully, she's better, but I see nothing in what they have said which would make me change my mind.

What might have made me change my mind is if I had some medical evidence that Barbara Johnson was able to walk without any aid whatsoever for eight hours so that

she could be fully employed, that she didn't have those back aches, she didn't need pain medication or any of that. If I had had that evidence before me, I certainly would have granted you a new trial, but I don't have that evidence.

I have got the testimony of two agents who saw her and it was speculative on their part, that just because she asked if there are going to be cameras, that, you know, when they said yes, she immediately went into that floppy look. She did that here, that's why I said she needed psychiatric treatment. I mean, she made herself all bent up. She was a contortionist.

But that's not what I based my ruling on, not on the exaggerations or the acting which she did. It was based upon the medical testimony, not Barbara

Johnson's testimony, and that is something that I want the record to be very clear so that the Fifth Circuit knows it wasn't because I believed everything that Barbara Johnson told me. It was because I believed what the medical doctors told me, who said that in their opinion, she could never work again, she could not have gainful employment. In their opinion, she would have pain for the rest of her life. In their opinion, you know, these things happen. That is what this Court based its opinion on.

Let me tell you, I looked long and hard at Barbara Johnson. She did exaggerate. I looked at her and I said, "I wonder if she has just completely fooled these doctors," because that is what I based my ruling on, not on her testimony.

Okay. That is my ruling. I am

going to deny it.

Now, if you get me some doctors in here, Mr. Womack, who say -- and the very same doctors, then maybe I might consider it.

MR. VERDERAME:

Your Honor, may I file these? I listed them as Motion for New Trial Exhibits Johnson 1 and Johnson 2.

THE COURT:

Let them go into the Fifth Circuit.

Court will stand in recess until 2:00 o'clock this afternoon.

THE CLERK:

Everyone rise, please.

Court stands in recess until 2:00 o'clock this afternoon.

MR. VERDERAME:

Thank you, Your Honor.

(End of Proceedings)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-5263-L

BARBARA JEAN JOHNSON

VS.

OFFSHORE EXPRESS, INC.

ORAL RULING ON ORIGINAL TRIAL
BY DISTRICT COURT
January 22, 1986

Beginning at Page 97, Line 1:

(Afternoon Session, Wednesday, January 22, 1986)

THE CLERK:

Court is now in session.

THE COURT:

Let me say that I have reviewed the testimony and the exhibits and I am going to dictate findings into the record.

If anyone decides that they wish to

appeal this decision and if they feel that the findings that I have made -- if they feel that they would like me to go into more detail on the evidence I've based these findings on for appellate purposes only, then, of course, I would do that, but hopefully this will be sufficient.

I've done this sort of in a hurry, so you'll have to bear with me.

I'm going to go back to the liability so that I can put all of this in at this time.

All right. The Plaintiff, Barbara Jean Johnson, brought this Maritime Law claim and Jone's (sic) Act claim and General Maritime claim against her employer, Offshore Express.

On April the 27th, 1983, Ms. Johnson was employed by Offshore as an able-bodied seaman aboard the vessel the CHAMPION

EXPRESS. Offshore was operating the CHAMPION EXPRESS for the owner of the vessel that was Shearson Equipment out of New York and it was pursuant to an operating and management agreement dated March the 23rd, 1982.

Plaintiff initially worked aboard the vessel as a cook but this was her first trip as an able-bodied seaman.

Present aboard the vessel was Mr. Olsen, the engineer, James Clay, the first mate, the Captain, and I don't remember what his name was right offhand, Barbara Johnson, the Plaintiff, Phil Fontenot, the deckhand, and Robert Jones, the cook.

Because of Barbara Johnson's size, it was agreed between her, Clay, the mate, and Fontenot, the deckhand, that Fontenot would do all the outside work and Plaintiff, what James Clay called, sanitary

maintenance work, which was all inside.

On April 27, 1983, Barbara Johnson was ordered by James Clay to make up the upper bunks on the CHAMPION EXPRESS for workers of Amoco Production Company who were to be provided lodging aboard the vessel pursuant to a contract. I know there was some testimony that generally speaking passengers aboard the vessels made up their own bunks, but this was a special situation where the Defendant was providing lodging and, accordingly, they had the obligation to make up these bunks.

Sometime between 5:00 and 7:00 o'clock p.m., and I'm not sure, there was contradictory evidence as to the exact time, Barbara Johnson was making up the upper bunk by climbing entirely into the bunk and as she was kneeling on the edge of the bunk facing into the front of the

vessel, the vessel lurched, causing her to fall backwards approximately six feet onto the steel deck. At that time, the vessel was moored in four to six-foot seas.

Under the facts and circumstances of this case and based upon the weight of the credible evidence, this Court finds that the vessel was unseaworthy in that it lacked proper equipment for a 4'11" person to make up an upper bunk in the four to six seas, and, additionally that it lacked adequate manpower and this unseaworthy condition or these unseaworthy conditions were the legal cause of Barbara Johnson's accident.

The only equipment provided to Barbara Johnson to make the upper bunks was a small fold-down foot step, which the evidence, I think, shows approximately four inches by two inches, and an overhead

handrail.

Clay testified that he never used the handrail because in his opinion it was unsafe to use. The physical dimensions of the configurations of the upper bunk as well as the mattress made it physically impossible for the Plaintiff to make up the upper bunk while standing on the deck. The physical dimensions and configurations of the bunks, as well as the fold-down foot step and the overhead handrail, are depicted in the photographs and we all took a look at that and there was a lot of testimony.

In addition, Mr. Marks, Plaintiff's expert, did drawings involving the size of the room, the height of the bunks, as well as Barbara Johnson's physical height. The dimensions and configurations of the upper bunks and the mattress made it physically

impossible for the Plaintiff to make up the upper bunk using the small fold-down footstool as well as the overhead handrail, which the testimony showed was slightly behind Barbara Johnson and it would have been impossible for her to hang onto this rail and attempt to make up the bunk.

As I think I've already stated, the fold-down stool or step, as well as the rail, the testimony by Vorenkamp and others was that these two devices were not placed aboard the vessel for the purpose of making up the upper bunk, but were used merely as a device to swing into the upper bunk so that one could get in there to sleep.

Accordingly, the only way, the evidence shows that the only way for the Plaintiff to have made up the upper bunk was to climb into the bunk, kneel on the edge of the bunk thus exposing herself to

the movement of the vessel being completely unprotected in any way if the vessel had lurched.

Had Plaintiff been provided a ladder held by an assistant, she could have performed her duties, this Court believes, with reasonable safety.

Additionally, the Court finds that based upon the weight of the credible evidence Defendant was negligent and this negligence was a legal cause of Plaintiff's accident. Defendant was negligent in ordering Plaintiff, a 4'11" person, to make up the upper bunk in four to six-foot seas without providing her with assistance. Defendant knew or should have known that this was Plaintiff's first job as an able-bodied seaman. The evidence is that she was totally inexperienced in making up upper bunks. Barbara Johnson was a cook.

This was her first experience as an able-bodied seaman and even then she wasn't a true able-bodied seaman.

The evidence reflects that Plaintiff and Mr. Clay, the mate, had a personality conflict. He readily admitted and testified that he wanted her, quote, "Fired off his boat," end quote. Captain Vorenkamp testified that in his opinion the captain or the mate of the vessel should have given Plaintiff an assistant to help her make up that upper bunk. This Court finds the failure to do so constituted negligence.

Although Clay, Jones and others employed aboard the vessel testified that they made up the upper bunk by standing on the lower bunk, they were at least 5'8" tall. The uncontradicted evidence, the testimony of Vorenkamp, as well as Marks,

as well as the diagrams and the photographs, shows that it would have been physically impossible for Barbara Johnson to have stood on the lower bunk and made up the upper bunks and this was physically impossible because of her size.

The Court finds that Barbara Johnson was also at fault and that her fault was also a legal cause of her accident. She should have insisted that the mate provide her with assistance. She had quite a bit of experience working aboard vessels even though she had not had any experience working or making up upper bunks and she knew or she should have anticipated that the vessel, a vessel in four to six seas, could have lurched, and yet she was up there totally unprotected without bracing herself, without thinking about what could have happened to her, and, accordingly, I

find that Barbara Johnson was twenty percent at fault in causing her own accident.

This Court finds from the weight of the credible evidence that as a result of the accident in question the Plaintiff has sustained serious permanent injuries to her body.

Immediately after her fall Plaintiff was found on the floor by Bob Jones, the cook. He assisted her to her room where she remained for approximately twenty-four hours.

The following evening at approximately 7:00 o'clock p.m., Plaintiff was brought to shore and taken by ambulance to the Abbeville General Hospital in Abbeville, Louisiana. The testimony is that she had to be physically assisted off the vessel with the aid of two attendants,

I believe, ambulance attendants.

At Abbeville General, a large bruise was noted over Plaintiff's sacrum and she was x-rayed.

She was released the next day and remained in an Abbeville motel for a few days until she got transportation to her home in Galveston, Texas. The evidence is, is that while she was at the motel, she was under medication for pain. The evidence also reveals that the next morning after she woke up, she found that the bed had been wet. She was not aware of this or had any knowledge of this until she noticed that the bed had been wet.

Plaintiff returned to Texas or to Galveston on May the 10th, 1983, or she returned before that. Excuse me. On May the 10th, she was seen by Dr. John Moore in Galveston who noted the bruises that she

had suffered and it was consistent with her history of a fall occurring approximately two weeks prior to his examination of her.

On June the 3rd 1983, Plaintiff was admitted to Methodist Hospital by Dr. Alain Cracco, an orthopedic surgeon. A TENS unit to control her pain was prescribed and Dr. Cracco began the scheduling of diagnostic tests and conservative care, including nerve blocks.

On June the 6th, Dr. Karnik, a urologist, performed tests at Methodist and, in his opinion, concluded that Plaintiff suffered from a bladder problem with a neurogenic component. Plaintiff was treated conservatively for her back problems with no improvement.

Diagnostic studies were made. The tests showed that there was some abnormality and that she had weaknesses in

the Achilles reflex.

On July 5, 1983, Drs. Cracco and Llewellyn operated on Plaintiff's back and they did not find a herniated disk. Plaintiff remained in Methodist Hospital until September 14, 1983 when she was transferred to F. Edward Hebert where she remained until December the 11th of that year.

She was re-examined by Dr. Cracco in early December of 1983 and was re-admitted to Methodist on December the 11th, 1983.

An arachnoid cyst was discovered in the general area of the first surgery and on December 27, 1983 Drs. Cracco and Llewellyn performed a second back surgery to remove the cyst. Plaintiff remained at Methodist until February 3rd, 1984 when she was re-admitted to F. Edward Hebert.

After her second surgery, Dr. Cracco

prescribed a special back brace to relieve Plaintiff's curvature in her spine and to relieve her pain and discomfort.

Plaintiff remained in F. Edward Hebert for rehabilitation of her back from February 3rd, 1984 until May 30th, 1984.

On May 30, 1984, Plaintiff was transferred from F. Edward Hebert to the Pain Clinic at Jo Ellen Smith where she remained for two days and then to the Touro Infirmary Pain Clinic where she was an in-patient.

The evidence reflects that since June 29th she has not been hospitalized as an in-patient with the exception of a short period for further diagnostic studies of her back problems.

Based upon the weight of the credible evidence, this Court finds that Plaintiff cannot walk more than a few steps

without the aid of one or two long-strand (phon.) crutches and that she is suffering from pain in her back and leg caused either by scarring or, as Dr. Levy testified, arachnoiditis. This Court finds that all of this is caused by her fall of April 27, 1983 and to her first and second surgeries.

The evidence reflects that Plaintiff suffers from congenital spina bifida of the S-1. Dr. Cracco testified that in his opinion the trauma aggravated her preexisting congenital condition.

Prior to the fall of April 27, 1983 Plaintiff was very active. The evidence reflects that she had no back restrictions of any kind, that she could run, walk, she certainly was able to work.

In November, Plaintiff underwent a- - In November of '82, she underwent a pre-employment physical for Offshore Express

and was cleared without restrictions. There is evidence that out of a total of 162 days she worked 137 of those days, and at one stretch worked continuously for approximately seventy-five days. This was done in the offshore industry aboard vessels where there is still quite a bit of back and shoulder and leg movement necessary.

Ms. Johnson has a complex medical history. There was some evidence that she had had some type of a fall occurring in 1982, but obviously if she had suffered any type of back injury, that injury had been cleared.

Despite her complex medical history, the evidence reflects that on the date of the accident in question the Plaintiff was in relatively good health and was not suffering from any disability injuries.

Accordingly, this Court finds that Plaintiff's congenital spina bifida was asymptomatic before the incident and that after the accident in question it became symptomatic.

The Court finds the Plaintiff is suffering, as I said, from either pain from scarring or based upon Dr. Levy's testimony, from arachnoiditis caused from a tear in the dura as a result of the first surgery. Dr. Levy testified that this is a permanent condition rendering the Plaintiff permanently disabled causing her pain, severe pain, permanent pain.

The Court finds that Plaintiff suffers from an abnormally inward rotation of the left hip that is voluntary, perhaps to relieve pain that she feels, and it is not constant. Although Defendants took hours and hours of films, there was a very

minor short segment that showed that Plaintiff was able to walk straight without her foot, her left foot, being over on the side.

The testimony reflects that there appears to be no clinical reason for her to walk that way, but yet she does. And the Court concludes that Plaintiff has failed to prove that this abnormal rotation of the hip, walking on the outside of the left foot, resulted from the accident in question.

The Court also finds from the weight of the evidence that Plaintiff's back and hip are permanently damaged. The evidence shows that there is approximately a two-inch difference between the left and the right hip. This is caused from the accident. Plaintiff walks with a noticeable limp. This is permanent. Dr.

Levy testified that she cannot sit or stand for long periods of time. The Court finds that this is directly related to the accident in question.

We come to Plaintiff's contention that her urinary problems were caused by the accident in question. This Court finds that Plaintiff has failed to prove this. Dr. Cracco testified that Plaintiff is suffering from severe urinary stress incontinence. This is not related to nerve root problems.

Dr. Karnik testified to the contrary. He testified that she is suffering from severe urinary stress incontinence that was aggravated by the fall. In addition, he testified that there were neurogenic components to her bladder problems also caused from the fall.

However, based upon the weight of

the credible testimony and the testimony of Dr. Baum, this Court finds that Plaintiff's urinary problems are not related to the accident in question.

Now, there has been subsequent, to quote Dr. Baum, Dr. Baum testified that the Plaintiff in this case has a mechanical problem and it is in no way related to the accident.

The evidence is that Barbara Johnson underwent a former operation for urinary stress incontinence. That operation, obviously, was not successful. The testimony is that the fall would not have caused the operation that was performed on her to have failed. And, accordingly, this Court finds that her urinary stress incontinence that she suffers at this time was not caused from the accident and that her bladder problems that she now suffers

from are not caused from the accident in question.

There have been insinuations in the testimony of this case by Dr. Glynn and Dr. Morris that Plaintiff has some type of a psychiatric problem in that she has overly exaggerated her deformity, the rotation of the hip, and that there is no objective reason which has been found for her gait. However, not one person has testified that the Plaintiff is a malingerer, but on the contrary, that her medical conditions are indicated.

It may very well be that Plaintiff's psychological problems are related to the accident in question, yet there has been no evidence presented to this Court where this Court can find this. Although the Court feels that Plaintiff has proved by a preponderance of the evidence that she has

suffered mental anguish, there's been some testimony that perhaps she may, after this case has been concluded, need some psychiatric treatment, yet no evidence was presented as to the length of time or the cause, and, accordingly, that is one item of damage that this Court feels it cannot consider at this time or perhaps any time, but it cannot consider, period.

In the testimony of Dr. Morris, after listening to his testimony, this Court has concluded that basically Dr. Morris was recommending psychotherapy, but he could not -- the length of time, what type, what cause, was never presented to the Court and, in reviewing his testimony, I felt that although it had been proved, this Court has nothing to base that upon.

All right. Let me get on to something else.

Based upon the weight of the credible evidence, this Court finds that because of Plaintiff's back and leg problems she is totally disabled from all forms of gainful employment and the probability is that she will be totally disabled for the rest of her life.

Mr. Roberts testified that if Plaintiff got a college education that she could work part-time. Of course, this would require at least a four-year college education and a reduction in the pain in her back and legs, so as to permit her to work.

Dr. Levy testified that he didn't think she could stand for more than thirty minutes or she would have difficulty sitting.

In this Court's opinion, there's no question the Plaintiff is totally disabled

at the present time and any testimony that Plaintiff can or may return to work sometime in the future is not supported by a preponderance of the evidence but is purely speculative.

Plaintiff is forty-five years old. She has a short work life. It would take her at least four years to get a degree, and even if she managed to do that, there is no evidence that one, in Plaintiff's physical condition, she would be hired, even on a part-time basis. So, accordingly, the Court finds that she is permanently and totally disabled from employment.

Plaintiff was born on August the 31st, 1940 and is forty-five years of age. She has a reasonable life expectancy of 34.3 years and a work life of 10.6. This is based on Mr. Clesi's testimony.

The evidence reflects that on April the 27th, 1983 Barbara Johnson was earning $60.00 a day with the Defendant, Offshore Express, and that her food and lodging came to approximately $20.00 per day.

Mr. Robert Schmidt testified that four days after the accident Plaintiff was given a raise from $60.00 to $65.00 per day effective May 1, 1983. The evidence is that Plaintiff has not worked since April 27, 1983. The Court finds that her net loss of past wages, which is $27,474.00, and loss of benefits, that's $20.00 a day while living aboard the vessel, to date, that which comes to $9,706.00, and I'm using the fourteen days on and seven days off testified to by Mr. Clesi, comes to $37,180.00.

Based upon Mr. Clesi's conservative testimony, very conservative, and the real

rate of interest using Culver, which he estimated to be 1.83 percent, this Court finds the Plaintiff will sustain future loss of earnings discounted in the sum of $123,708.00. This again includes her net loss of future earnings discounted to present value, that's $91,415.00, as well as her gross that's not to be discounted, food and lodging, that is not to be reduced for taxes, food and lodging expenses in the amount of $32,293.00.

Plaintiff spent over one year in the hospital as a result of her back injuries and/or her emotional problems resulting from this accident. She underwent two major surgical procedures for her back. The pain she suffers is severe, constant and permanent. As I've stated, although there was testimony that Plaintiff may have exaggerated her condition, that she was

very dramatic, et cetera, not even Dr. Morris thought that she was a malingerer. Not one person testified to that. But on the contrary, the testimony is that her pain was very real.

Dr. Seltzer testified that in his opinion she had at least a ten percent disability of her whole body, Dr. Cracco, thirty to fifty percent. This Court finds that Plaintiff is entitled for past and future mental pain and suffering the sum of $370,000.00.

The evidence shows that Plaintiff is disfigured and disabled as a result of her inability to walk normally. She will have to walk with her crutches for the rest of her life, or one crutch, and therefore, for the past, present and future disfigurement and physical disability, this Court finds that Plaintiff is entitled to an award of

$185,000.00.

Although there was some evidence that Plaintiff may need incontinent pads for the remainder of her life, of course, this Court has determined that her urological problems do not come from this accident.

Additionally, the Court finds that Dr. Seltzer, well, Dr. Seltzer testified that Plaintiff is not a candidate for future surgery at this time, or at the time of the testimony.

In view of the fact that the Court finds that Plaintiff has failed to prove the amount of any psychiatric treatment, failed to prove the amount of any physical therapy that she may need in the future, this Court will render judgment in favor of Barbara Johnson and against the Defendant in the amount of $715,888.00 less twenty

percent for her own fault.

This morning I rendered judgment in favor of Dr. Llewellyn and Dr. Cracco and against Third-Party Plaintiff, Offshore, and I didn't really do -- I'd like to just supplement that a little, if I may.

Dr. Llewellyn testified that his-- the major reason for his involvement in this entire affair was the fact that Plaintiff had a neurogenic bladder and I know that there has been some testimony that's been attempted to get in here that she did not have one. But the evidence is very clear and Dr. Karnik specifically testified that in his opinion she had a neurogenic bladder and that he told Dr. Llewellyn that.

Accordingly, although the third-party plaintiffs have attempted to show that Dr. Llewellyn misdiagnosed, I think

that he was able to rely on Dr. Karnik's assurances that in his opinion, the urologist, that she had this condition.

Now, I also reviewed Dr. Leeds' (sic) testimony who first testified that in his opinion the neurological standard of care was violated, but after he became aware of where the location of the dura tears were, he changed his opinion. He stated that, "I cannot say that three dural tears is outside the standard of care." He further testified that -- this Court will find that based upon the evidence that the purpose behind the operation was to perform a foraminotomy (sic) and not the search for a neurogenic bladder.

He also testified that once the decision had been made to do the foraminotomy to relieve the compression of the nerve root and once the foraminotomy

was in progress, that there is nothing wrong with the exploration of the disk.

He also testified that with the best of surgical techniques a dural tear during the laminectomy and the foraminotomy is not usual.

He also testified that if the tear occurred during the refraction, that, in and of itself, does not indicate any surgical negligence and that the operating technique used was within the standard of care.

But, in addition, Dr. Klein, an expert in neurosurgery who is a professor, he is the Chairman of the Department of Neurosurgery at LSU, teaches at Ochsner, is Board certified, testified that there was nothing improper in the exploration of the disk to the midline, and especially anyone who has had a bladder or a bowel problem.

He pointed out that there was a diagnosis of a neurogenic bladder, but he said even assuming that there was not one, it was not improper for these two surgeons to explore the disk to the midline under the facts and circumstances of this case.

Again, based upon the records in this case, the surgical techniques were not substandard.

Now, there was a lot of talk about the fact that Dr. Llewellyn didn't write up the correct history, or maybe it wasn't the correct history, but a complete history, that he should have done this for the record and that he should have done that. That may well be, however, that was not the legal cause of Barbara Johnson's problems.

The Court finds that it was neither the surgical techniques nor the fact that they decided to operate, nor the fact that

they didn't write the proper history, but make a complete history or write the records the way they should have been written, nothing that they did. The Court finds that the Third-Party Plaintiff has failed to prove that anything they did or failed to do contributed to Barbara Johnson's injuries.

Accordingly, let judgment be entered in favor of Barbara Johnson and against Defendant Offshore Express in the sum of $715,888.00 less twenty percent, including all costs.

In addition, let judgment be entered in favor of Dr. Llewellyn and Dr. Cracco against Third-Party Plaintiff, Offshore Express, Third-Party Plaintiff to pay all costs.

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